

and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On September 13, 2011 appellant, then a 43-year-old rural letter carrier, filed an occupational disease claim (Form CA-2) alleging injury due to performing her repetitive work duties.³ OWCP initially accepted her claim for left neck sprain and left brachial neuritis/radiculitis (not otherwise specified). Appellant received partial disability compensation on the daily rolls effective October 24, 2011.⁴

Appellant returned to full-duty work on December 3, 2012, but stopped work on July 23, 2013. On September 4, 2013 OWCP expanded the acceptance of her claim to include the conditions of left shoulder sprain and aggravation of cervical degenerative disc disease.

In a November 12, 2013 letter, OWCP advised appellant that she began receiving total disability compensation on the periodic rolls, effective October 20, 2013. It indicated that she was receiving disability compensation at the “75 percentage of rate of pay” and that her payments would be made by electronic fund transfer (EFT).⁵ OWCP informed appellant that she would be paid disability compensation on the periodic rolls every 28 days and advised her about the effect of dependency on her receipt of compensation by noting:

“CHANGE IN STATUS OF DEPENDENT. If you have one or more dependents, and the status of any dependent changes, notify the OWCP at the address shown on the front of this letter. In the letter, include your file number, the name of the dependent whose status changed, the effective date of the change, and the nature of the change in status. Your signature must appear on the letter.

“If you claimed only one dependent, DO NOT CASH CHECKS RECEIVED AFTER THE CHANGE IN STATUS of this dependent. Otherwise, an overpayment of compensation may result. Return the checks promptly to this office.”

In a May 6, 2015 letter, OWCP requested that appellant complete and return an EN1032 form which posed questions regarding such matters as her employment activities, earnings, and

³ Appellant indicated that she first became aware of her claimed condition and its relationship to her federal employment on August 13, 2011. She began performing light-duty work for the employing establishment on a part-time basis in early August 2011.

⁴ These payments were made at the augmented 75 percent rate for claimants who had at least one dependent within the meaning of FECA. *See infra* notes 10 through 14. On February 23, 2012 appellant underwent OWCP-approved anterior cervical discectomy and anterior fusion at C5-6 and C6-7 and, on April 16, 2014, she underwent OWCP-approved left shoulder arthroscopy with subacromial decompression. OWCP paid appellant total disability compensation for periods of total work stoppage related to these surgeries.

⁵ Appellant last received disability compensation on June 7, 2016.

dependency status for compensation purposes.⁶ The EN1032 form contained text which advised appellant that a claimant who has no eligible dependents is paid compensation at 66 2/3 percent of the applicable pay rate and that a claimant who has one or more eligible dependents is paid compensation at 75 percent of the applicable pay rate. Appellant could claim augmented compensation for a dependent if she had one or more of the following: (a) a spouse (including a same sex spouse) who lived with her; (b) an unmarried child, including an adopted child or stepchild, who lived with her and was under 18 years old; (c) an unmarried child who was 18 years old or over, but who cannot support himself or herself because of mental or physical disability; (d) an unmarried child under 23 years old who was a full-time student and had not completed four years of school beyond the high school level; or (e) a parent who totally depended upon her for support.

On July 7, 2015 OWCP received an EN1032 form, completed by appellant on June 14, 2015, in which she indicated that she was not married, but that she was claiming dependency status on account of her daughter.

On July 17, 2015 appellant contacted OWCP by telephone and advised an OWCP claims examiner that her daughter was still finishing up her credits for high school and was currently enrolled in a “continuation program” with a planned graduation date of October 2015. She indicated that her daughter was in a vehicular accident and lost approximately a year’s worth of school. OWCP’s claims examiner noted in a document memorializing the telephone call that she told appellant she would send her a student dependency form so that she could have the school provide the pertinent information.

In a July 17, 2015 letter, OWCP advised appellant that her compensation could continue to be paid at the dependent rate on behalf of an unmarried child age 18 or older who is either a full-time student or incapable of self-support. It informed appellant that a student is defined in 5 U.S.C. § 8101(17) as one who is currently pursuing a full-time course of study at an accredited school, college, or university, or at a technical, trade, vocational, business, or professional school. Compensation was not payable beyond the end of the semester or enrollment period in which the child either completed the fourth year of education beyond high school or reached the age of 23 years. OWCP requested that appellant provide verification of full-time student status or incapacity for self-support with respect to her daughter. It provided her the aforementioned student dependency form to complete and return with respect to full-time student status. The form contained a portion to be completed by a school official.

On August 3, 2015 OWCP received appellant’s response, signed on July 28, 2015, in which she noted her daughter’s date of birth and that her daughter was not married. In response to a question regarding whether her daughter was attending school on a full-time basis, she checked a box marked “Yes” and provided the notation “online.” Appellant indicated that this attendance began in August 2014. She crossed out the portion of the form to be completed by a school official (Part B) and noted that her daughter was currently enrolled in an online course to complete her high school equivalency test. Appellant asserted that, upon completion of this program, her

⁶ Appellant’s answers to the questions were to cover the 15-month period prior to the date she completed and signed the form.

daughter would enroll in Shasta College in a culinary arts program. She indicated that a 2011 vehicular accident put her daughter behind in her schooling.

In an August 6, 2015 letter, OWCP advised appellant that she had failed to submit sufficient documentation to show that her daughter qualified as a full-time student under FECA such that she had established dependency status. It noted that, even though she had indicated her daughter was enrolled in online courses, she still needed to have Part B of the student dependency form completed by an online school official. OWCP afforded appellant 30 days to have Part B completed by an online school official and advised that, if no response was received within the allotted period, her compensation would be calculated based on the basic rate, and an overpayment would be declared retroactive to the date of her daughter's 18th birthday.

Appellant did not respond to OWCP's request within the allotted period. Effective August 23, 2015, OWCP reduced her compensation from the augmented rate (75 percent of the applicable pay rate) to the basic compensation rate (66 2/3 percent of the applicable pay rate).

In a January 12, 2016 letter, OWCP advised appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$838.64 for the period June 25 to August 22, 2015 because she did not have a dependent within the meaning of FECA during this period which would qualify her to receive compensation at the augmented rate of 75 percent.⁷ It advised that her daughter turned 18 years old based upon the date of birth provided and that appellant failed to provide evidence that her daughter was either a full-time student or incapable of self-support. OWCP also made a preliminary determination that appellant was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known was incorrect. It indicated that she was aware or should have reasonably been aware that she was not entitled to compensation at the augmented rate of 75 percent because she did not have a dependent within the meaning of FECA after her daughter turned 18 years old. OWCP advised appellant that she could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. It informed her that she could submit additional evidence in writing or at a precouplement hearing, but that a precouplement hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of recovery of the overpayment.

Appellant challenged OWCP's preliminary overpayment determination and requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. She also

⁷ The record contains an OWCP-produced worksheet showing that appellant received \$6,589.63 in disability compensation for the period June 25 to August 22, 2015 at the augmented rate of 75 percent but would have received \$5,750.99 in compensation for this period if paid at the basic compensation rate of 66 2/3 percent. The difference between these two figures is \$838.64. Appellant received electronic payments on June 27, July 25, and August 22, 2015 which collectively covered the period of the claimed overpayment (June 25 to August 22, 2015). The first payment on June 27, 2015 paid compensation for the period May 31 to June 27, 2015, but only covered the period of the overpayment from June 25 to 27, 2015. The July 25, 2015 payment provided compensation for the period June 28 to July 25, 2015 and the August 22, 2015 payment provided compensation for the period July 26 to August 22, 2015, *i.e.*, periods which collectively covered the remaining period of the claimed overpayment (June 28 to August 22, 2015).

submitted a financial information questionnaire, signed on January 21, 2016, in which she provided figures for her monthly income, monthly expenses, and assets.

During the hearing held on September 7, 2016, appellant testified that she did not believe that she had been overpaid and noted that she “didn’t agree that the money should have stopped” when her daughter turned 18 years old because she was her sole provider. She asserted that her daughter had mental health issues that she believed might entitle her to augmented compensation. Appellant indicated that she was not receiving OWCP compensation and discussed her monthly income, monthly expenses, and assets.

By decision dated October 14, 2016, OWCP’s hearing representative determined that appellant received an overpayment of compensation in the amount of \$838.64 for the period June 25 to August 22, 2015 because she did not have a dependent within the meaning of FECA during this period. She noted that appellant did not submit evidence that she had a qualified dependent during this period which would entitle her to receive augmented compensation at the 75 percent rate. The hearing representative found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.⁸

LEGAL PRECEDENT -- ISSUE 1

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty.⁹ If the disability is total, the United States shall pay the employee during the period of total disability the basic compensation rate of 66 2/3 percent of his monthly pay. A disabled employee is entitled to an augmented compensation rate of 75 percent if he or she has one or more dependents.¹⁰

A dependent includes an unmarried child who, while living with the employee or receiving regular contributions from the employee toward his or her support, is either under 18 years of age or over 18 years of age and incapable of self-support due to physical or mental disability.¹¹ A child is also considered a dependent if he or she is an unmarried student under 23 years of age who

⁸ OWCP’s hearing representative indicated that appellant was aware that her compensation was paid at an augmented rate, but did not provide evidence, despite OWCP’s request, of her daughter’s continued dependence. The hearing representative required recovery of the overpayment by deducting \$70.00 from appellant’s continuing compensation payments every 28 days. With respect to the recovery of an overpayment, the Board’s jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant was not in receipt of continuing compensation at the time of OWCP’s overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

⁹ 5 U.S.C. § 8102(a).

¹⁰ *See O.R.*, 59 ECAB 432, 436 (2008). *See also* 5 U.S.C. §§ 8105(a) and 8110(b).

¹¹ 5 U.S.C. § 8110(a).

has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying school, college, university, or training program.¹²

If a claimant received compensation at the augmented rate during a period when he or she did not have an eligible dependent, the difference between the compensation that was disbursed at the 75 percent augmented rate and the compensation that should have been disbursed at the 66 2/3 percent basic rate constitutes an overpayment of compensation.¹³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$838.64 for the period June 25 to August 22, 2015.

The record reflects that appellant's daughter turned 18 years old on her date of birth in the year 2015 and that appellant did not have a dependent within the meaning of FECA at that point which would have qualified her to receive compensation at the augmented rate of 75 percent.¹⁴ Appellant asserted that her daughter was participating in an online continuing education program, but she did not submit supporting evidence to show that she was a full-time student within the meaning of FECA such that she would still qualify as a dependent. OWCP provided appellant a form which contained a portion to be completed by a school official, but she crossed out that portion of the form without completing any portion of it. On the form, appellant mentioned that her daughter was involved in a vehicular accident in 2011, but she did not submit any evidence, such as probative medical evidence, to show that her daughter was incapable of self-support due to a physical disability.¹⁵

The record contains a worksheet showing that appellant received \$6,589.63 in compensation for the period June 25 to August 22, 2015 at the augmented dependency rate of 75 percent, but would have received \$5,750.99 in compensation for this period if she had been properly paid at the basic compensation rate of 66 2/3 percent. The difference between these two figures is \$838.64 and, therefore, the evidence establishes that appellant received an overpayment of compensation in the amount of \$838.64 for the period June 25 to August 22, 2015.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁶ The only exception to this requirement is a situation which

¹² See 5 U.S.C. § 8101(17); *E.G.*, 59 ECAB 599, 603 n.10 (2008).

¹³ See *Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

¹⁴ See *supra* notes 10 through 14.

¹⁵ See *supra* note 12. At the September 7, 2016 hearing, appellant asserted that her daughter had mental health issues that she believed might entitle her to augmented compensation. She did not submit any evidence to establish that she was incapable of self-support due to a mental disability. See *id.*

¹⁶ 5 U.S.C. § 8129(a).

meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹⁷ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁸

In determining whether an individual is not “without fault” or alternatively “at fault” in the creation of an overpayment, section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect....”¹⁹

The Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault the first or second time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment may lack the requisite knowledge.²⁰ The Board has also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from OWCP or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.²¹ Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.²²

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation for the period July 26 to August 22, 2015, thereby precluding waiver of recovery of the overpayment for this period. However, OWCP improperly determined

¹⁷ *Id.* at § 8129(b).

¹⁸ *L.J.*, 59 ECAB 264 (2007).

¹⁹ 20 C.F.R. § 10.433(a).

²⁰ *See V.S.*, Docket No. 13-1278 (issued October 23, 2013); *Tammy Craven*, 57 ECAB 689 (2006).

²¹ *See Tammy Craven, id.*

²² *See V.S., supra* note 20.

that appellant was at fault in the creation of the overpayment of compensation for the period June 25 through July 25, 2015.

OWCP determined that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect. The Board finds, however, that OWCP failed to establish that, at the time she accepted the first two electronic direct deposits of compensation covering the period of the overpayment from June 25 to July 25, 2015, she knew or should have known the payments were incorrect.

As discussed, in cases where a claimant receives compensation through direct deposit, OWCP must establish that, at the time a claimant received the direct deposits in question, he or she knew or should have known that the payments were incorrect.²³ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault for the first and second incorrect deposits into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposits, lacks the requisite knowledge.²⁴ Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of EFTs is that the claimant may lack the requisite knowledge at the time of the first and second incorrect payments.²⁵ Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.²⁶ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment through direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation, such as a bank statement or notification from OWCP, or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.²⁷

Appellant received compensation by direct deposit payments every 28 days. The evidence of record does not establish that, as of the first and second direct deposits of compensation, she knew or should have reasonably known that she was accepting payments containing monies to which she was not entitled. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time she received the direct deposits from OWCP on June 27 and July 25, 2015, collectively covering the period of the overpayment from June 25 through July 25, 2015, that a portion of the payment was incorrect, or that a reasonable period of time passed during which she could have reviewed bank statements or been informed of the incorrect

²³ See *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

²⁴ See *supra* note 20; see also *George A. Hirsch*, 47 ECAB 520 (1996).

²⁵ *Id.*

²⁶ *Id.*; see also *K.D.*, Docket No. 13-0451 (issued April 12, 2013).

²⁷ See *K.H.*, Docket No. 06-0191 (issued October 30, 2006).

payments.²⁸ Therefore, the Board finds that she is not at fault in the acceptance of the direct deposits covering the period of the overpayment from June 25 through July 25, 2015.

Even though OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.²⁹ In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP and/or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.³⁰

By the time appellant received the compensation payment electronically transferred on August 22, 2015 (covering the period July 26 to August 22, 2015), she knew or should have reasonably known both that she was not entitled to receive compensation at the augmented rate of 75 percent and that the August 22, 2015 compensation payment contained monies to which she was not entitled. In an August 6, 2015 letter, OWCP advised appellant that she had failed to submit sufficient documentation to show that her daughter qualified as a full-time student under FECA such that she had established dependency status. The Board further notes that enough time had passed, with a concurrent opportunity of discovery, that appellant realized or should have reasonably realized that the August 22, 2015 payment contained monies to which she was not entitled (*i.e.*, the difference between the augmented rate (75 percent of her wage loss) and the basic compensation rate (66 2/3 percent)).³¹ Because she accepted a payment which she knew or should have known to be incorrect for the period July 26 to August 22, 2015, the Board finds that appellant is not entitled to waiver of recovery of the portion of the overpayment created during this period.³²

Accordingly, the Board will affirm the finding of fault for the remaining July 26 to August 22, 2015 period of overpayment, thereby precluding waiver of recovery of the overpayment for this period. The Board will set aside the October 14, 2016 decision regarding the issue of fault as to the June 27 and July 25, 2015 direct deposits covering the period June 25 through July 25, 2015 and will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery for the portion of the overpayment covering the period June 25 through July 25, 2015.

²⁸ The Board notes that in a number of direct deposit cases the Board has only found the claimant without fault with respect to the period covered by the first direct deposit. *See e.g., Tammy Craven, supra* note 20. However, the particular facts of the present case dictate that appellant be found without fault with respect to the period covered by the first and second direct deposits. *See generally V.S., supra* note 20. The first direct deposit (received on June 27, 2015) only contained improper monies paid for a short period (only 3 days out of the 28 days covered by the direct deposit were paid at the improper 75 percent rate) and OWCP failed to show that appellant knew or should have reasonably known that this payment contained such limited improper monies. Although the second direct deposit (received on July 25, 2015) covered 28 days of compensation paid at the improper 75 percent rate (June 28 through July 25, 2015), OWCP also failed to show that appellant knew or should have reasonably known that this payment was improper, either through documentation from OWCP or through the passage of time.

²⁹ *See William E. McCarty*, 54 ECAB 525 (2003).

³⁰ *See J.W.*, Docket No. 10-1271 (issued February 3, 2011); *see also Karen Dixon*, 56 ECAB 145 (2004).

³¹ *See supra* note 14.

³² *See supra* note 20.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an \$838.64 overpayment of compensation for the period June 25 to August 22, 2015. The Board further finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation for the period July 26 to August 22, 2015, thereby precluding waiver of recovery of the overpayment for this period. However, the Board also finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation for the period June 25 through July 25, 2015; the case is remanded to OWCP for further consideration of waiver of recovery of the overpayment for this period.

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded to OWCP for further action consistent with this decision.

Issued: August 7, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board